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SERVICE DATE - JANUARY 16, 1997

SURFACE TRANSPORTATION BOARD

DECISION

STB Ex Parte No. 542

REGULATIONS GOVERNING FEES FOR SERVICE PERFORMED
IN CONNECTION WITH LICENSING AND RELATED SERVICES--1996 UPDATE

Decided: January 15, 1997

In Regulations Governing Fees for Service Performed in Connection with Licensing and Related Services--1996 Update, 1 S.T.B. 179 (1996) (1996 Fee Update I), the Surface Transportation Board (Board) issued final rules that established its 1996 user fee schedule. On September 3, 1996, Joseph C. Szabo, Illinois Legislative Director for the United Transportation Union (Mr. Szabo or petitioner), filed a petition to stay the filing fees for item (60), Labor arbitration proceedings, and item (61), Appeals to a Surface Transportation Board decision and petitions to revoke an exemption pursuant to 49 U.S.C. 10502(d), that were adopted in 1996 Fee Update I. In Regulations Governing Fees For Services Performed In Connection With Licensing and Related Services--1996 Update, 1 S.T.B. 231 (1996), Chairman Morgan issued a "housekeeping" stay to allow the Board sufficient time to consider the issues raised in Mr. Szabo's related petition to reopen the Board's decision in 1996 Fee Update I.

By decision in Regulations Governing Fees for Service Performed in Connection With Licensing and Related Services--1996 Update, STB Ex. Parte No. 542 (STB served Dec. 17, 1996) (1996 Fee Update II), the Board partially granted Mr. Szabo's petition to reopen 1996 Fee Update I and reduced the filing fee for item 61, Labor arbitration appeals, from \$7,600 to \$150. The Board, however, denied his requests that the \$150 fee for item (61), Appeals to a Surface Transportation Board decision and petitions to revoke an exemption pursuant to 49 U.S.C. 10502(d), be eliminated and that rail labor employees and their unions be exempted from filing fees for formal complaints and petitions for declaratory order. The fee changes adopted in 1996 Fee Update II are scheduled to become effective on January 16, 1997.

On January 6, 1997, Mr. Szabo submitted a petition to stay items (60) and (61) pending disposition of his petition for judicial review of the Board's decisions in 1996 Fee Update I and 1996 Fee Update II regarding these fee items. For the reasons, discussed below, the request to stay the establishment of these fee items is denied.

DISCUSSION AND CONCLUSIONS

The standards governing the disposition of a stay petition are: (1) that there is a strong likelihood that the movant will prevail on the merits; (2) that the movant will suffer irreparable harm in the absence of a stay; (3) that other interested parties will not be substantially harmed; and (4) that the public interest supports the granting of the stay. Hilton v. Braunskill, 481 U.S. 770, 776 (1987); Cuomo v. Unites States Nuclear Regulatory Com'n, 772 F.2d 972 (D.C. Cir. 1985) (Cuomo); Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc.; Virqinia Petroleum Job. Ass'n v. Federal Power Com'n, 259 F. 2d 921, 925 (D.C. Cir. 1958). The parties seeking a stay or

injunctive relief carry the burden of persuasion on all of the elements required for extraordinary relief such as a stay. Canal Authority of State of Florida v. Callaway, 489 F.2d 567, 573 (5th Cir. 1974).

Petitioner has not met any of the four criteria.

1. Petitioner Is Not Likely to Succeed on the Merits.

Mr. Szabo concedes that the \$150 fee that the Board will charge for item (60), Labor arbitration proceedings, along with the Board's invitation to seek a waiver of that fee, may not produce a hardship. However, he asserts that the fee is unconscionable because employees would have to pay for an arbitration proceeding resulting from a carrier's application and Board-mandated arbitration.

Petitioner's argument is without merit. The fact that arbitration proceedings result from carrier-initiated transactions and Board-mandated arbitration does not counsel against the minimal fee assessed. There is no question that a fee for a labor arbitration proceeding can be adopted under the Independent Offices Appropriation Act of 1952 (IOOA), 31 U.S.C. 9701. If the Board did not hear labor arbitration appeals, then the affected employees (or the railroad, if it is dissatisfied) would have no recourse to appeal the arbitrator's decision. The parties (railroads or rail employees) that seek the Board's review of a labor arbitration case are the identifiable beneficiaries of the Board's action on the matter.

Petitioner also argues that the \$150 fee in item (61), as it applies to petitions to revoke a transaction under 49 U.S.C. 10502(d), is inappropriate because it is motivated by anti-labor bias on the part of the Board. Mr. Szabo maintains that the Board failed to distinguish between petitions to revoke and appeals when it stated, in 1996 Fee Update I, that shippers, community groups, and rail carriers can also file a petition to revoke an exemption; a petition to revoke an exemption, he states, represents the original opportunity for a labor employee to present his or her views regarding the exemption of the involved transaction.

Petitioner's argument misses the point. Our proposed fee is not directed at labor. Our observation in 1996 Fee Update I that petitions to revoke exemptions are also filed by shippers, community groups, and even other rail carriers was not directed at labor at all, but simply reflected our experience handling such proceedings. Even if a petition to revoke an exemption presents the first opportunity for a rail employee to state his or her views regarding the exemption of a particular transaction, the focus of the proceeding is the review of the rail employee's arguments regarding the validity and the effect of the exemption. Therefore, the employee receives the special benefits of the Board's additional review of the exemption sought by the carrier. The \$150 fee is appropriate.

In addition, petitioner contends that a filing fee for item (61) as it applies to appeals of a Board decision is unfair. Mr. Szabo asserts that rail employees make frequent use of the appeal process, and that the imposition of a filing fee for such a proceeding would interfere with a rail employees right to seek a fair hearing under the Administrative Procedure Act, 5 U.S.C. 559 et. seq.

Petitioner has not presented any convincing evidence that the establishment of the filing for appeals will impede any rail employee's opportunity to obtain a fair hearing on a matter before the Board. As we emphasized in both 1996 Fee Update I and 1996 Fee Update II, the Board's fee waiver policy set forth in 49 CFR 1002.2 provides for the waiver of any filing fee and ensures that any party can bring its views to the Board.

In short, petitioner has not demonstrated that he will prevail on the merits of the proceeding.

2. Petitioner Has Failed to Demonstrate Irreparable Harm.

Petitioner contends that railroad employees will suffer irreparable injury without a stay. Notwithstanding the fact that a fee that has been paid can be refunded if the fee item is found unlawful upon review, petitioner is concerned that employees will be unable to afford the filing fee and hence unable to participate in the process.

Petitioner's argument is unavailing. In the unlikely event that these fee items are found to be unlawful by a reviewing court, refunds can be sought. The Board maintains computerized records of fee collections, and those records are sufficiently detailed that the Secretary's Office would be able to process any possible refunds. Petitioner's concern that employees will be financially locked out of the process from the outset has no merit; as the Board has noted on several occasions, parties may use the Board's fee waiver procedures to ensure that a labor arbitration proceeding, a petition or an appeal can be initiated. Furthermore, as noted previously, Mr. Szabo concedes that the \$150 fee, together with the waiver procedures, may not cause hardship.

3. A Stay of These Rules Will Substantially Harm Other Parties. If these filing fees do not go into effect, other parties will be harmed because they will have to continue to bear expenses that should be borne by the parties that file such proceedings and are the direct beneficiaries of the Board's action in such cases.

4. Petitioner Has Failed to Demonstrate that the Public Interest Demands a Stay. Finally, the public interest favors denial of the stay. As noted above, if these fee items are stayed, the general public will have to continue to bear expenses that should be borne by the users and beneficiaries of the Board's service. If these fee items are stayed, foregone collections can never be recovered. However, if these items are not stayed and they are overturned on judicial review, the amounts collected would be refunded. Based on the petitioner's failure to demonstrate irreparable injury, the lack of merit in his legal position, and the strong interests in the Board's compliance with federal user fee policy as expressed in the IOAA, the public interest requires the denial of the stay of the effective date for items (60) and (61).

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. The petition for stay of the effective date of item (60), Labor arbitration proceedings, and item (61), Appeals of Surface Transportation Board decisions and petitions to revoke transactions pursuant to 49 U.S.C. 10502(d), is denied.

2. This decision is effective on January 16, 1997.

By the Board, Linda J. Morgan, Chairman.

Vernon A. Williams
Secretary